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No. 88-302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES A. GORDON, Special Deputy State Insurance Commissioner of Maryland and Receiver for Eastern Indemnity Company of Maryland,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE TREASURY, *et al.*,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER

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8 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	5

TABLE OF AUTHORITIES

CASES:	Page
Crist v. J. Henry Schroder Bank & Trust Co., No. 87 CIV 1845 (S.D. N.Y. Oct. 14, 1988)	2
Grimes v. Crown Life Ins. Co., No. 86-1905 (10th Cir. Sep. 16, 1988)	2,3
Idaho ex rel. Soward v. Internal Revenue Service, No. 87-4057 (9th Cir. Sep. 7, 1988)	3,5
Law Enforcement Ins. Co. v. Corcoran, 807 F.2d 38 (2d Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987)	2
Levy v. Lewis, 635 F.2d 960 (2d Cir. 1980)	2,3
Securities and Exchange Comm'n v. National Securities, Inc., 393 U.S. 453 (1969)	5
Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982)	4
United Services Automobile Ass'n v. Muir, 792 F.2d 356 (3rd Cir. 1986), *cert. denied*, 107 S. Ct. 875 (1987)	3,4
STATUTES AND RULES:	
15 U.S.C. § 1011 *et seq.*	*passim*
Sup Ct. Rule 22.6	1

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Petitioner James A. Gordon, Special Deputy State Insurance Commissioner of Maryland and Receiver for Eastern Indemnity Company of Maryland, respectfully submits this Supplemental Brief. In accordance with Rule 22.6, this Supplemental Brief brings to this Court's attention two recent cases, as yet unavailable in the advance sheets, which further demonstrate that this Court must act to clarify the confusion which exists within the circuits regarding the primary state regulatory purpose provisions of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*

In *Crist v. J. Henry Schroder Bank & Trust Co.*, No. 87 CIV 1845 (S.D. N.Y. Oct. 14, 1988),[1] decided three weeks ago, the United States District Court for the Southern District of New York (Knapp, J.) abstained from hearing a suit brought against an insurance company undergoing insolvency proceedings in Missouri. In so holding, the court relied upon two Second Circuit cases, *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38 (2d Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987) and *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980), which emphasized that the McCarran-Ferguson Act's deferral to the state regulation of insurance extends to the establishment of comprehensive state systems for liquidating insolvent insurance companies. As Petitioner demonstrated in his Reply at 5-6, the sweeping language of the Fourth Circuit opinion below is inconsistent with these Second Circuit holdings because abstention is functionally equivalent to McCarran-Ferguson Act preemption. The opinion in *Crist*, therefore, highlights the differing constructions of the primary purpose of the McCarran-Ferguson Act within the circuits and underscores both the confusion which exists with regard to this important issue and the compelling need for this Court to clarify this jurisprudence.

Similarly, less than one month before *Crist* was decided, the United States Court of Appeals for the Tenth Circuit also adopted the Second Circuit's rationale in *Levy* by holding that a district court should have abstained from hearing a federal claim against an insurance company undergoing state liquidation proceedings because the McCarran-Ferguson Act's deferral to state regulation of insurance includes state

[1] The slip opinion is available on *Westlaw* at 1988 WL 105987.

regulation of insurance insolvencies. *Grimes v. Crown Life Ins. Co.*, No. 86-1905 (10th Cir. Sep. 16, 1988).[2] As indicated, this analysis, adopted by the Second and Tenth Circuits, directly conflicts with the conclusion reached by the Fourth Circuit below and the recent opinion of the Ninth Circuit in *Idaho ex rel. Soward v. Internal Revenue Service*, No. 87-4057 (9th Cir. Sep. 7, 1988), discussed in Petitioner's Reply Brief at 2-3.

Significantly, the *Grimes* court also relied upon *United Services Automobile Ass'n v. Muir*, 792 F.2d 356 (3rd Cir. 1986), *cert. denied*, 107 S. Ct. 875 (1987) as support for its holding. A brief examination of the Third Circuit's opinion in *Muir* underscores the depth of the divisions between the circuits in interpreting the primary state regulatory purpose provisions of the McCarran-Ferguson Act.

In *Muir*, United Services Automobile Association ("USAA") challenged a Pennsylvania statute which barred insurance companies from doing business in the state if they also owned a financial institution. Accordingly, the statute at issue in *Muir* arose pursuant to the primary state regulatory provisions of the McCarran-Ferguson Act. The district court abstained from hearing USAA's suit because the McCarran-Ferguson Act gave the states exclusive control over the regulation of insurance, and properly cited *Levy* for the proposition that regulation of the business of insurance includes the liquidation of insolvent insurance companies.

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[2] The opinion will be reported at 857 F.2d 699.

The United States Court of Appeals for the Third Circuit reversed the district court decision to abstain but agreed with the lower court that regulation of an insolvent insurance company constitutes state regulation of insurance under the primary purpose provisions of the McCarran-Ferguson Act. Significantly, in reaching this conclusion, the Third Circuit employed the test announced by this Court in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982) for determining whether a particular state statute regulates the business of insurance - the very case relied upon by the Fourth Circuit below in reaching the exact opposite result. 792 F.2d at 364.[3] Although the Third Circuit held that the Pennsylvania statute which prohibited USAA from owning a bank did not regulate the business of insurance under the three-part *Pireno* test, the court squarely concluded that state laws regulating insurance insolvency do regulate the business of insurance under *Pireno*. *Id.* As the Third Circuit wrote,

> the state regulations implicated in Levy concerned both the future coverage of policyholders and their relationship with a defunct insurer, and so were authorized under McCarran-Ferguson.

Id.

The significance of this conclusion and the stark conflict between the Third, Fourth and Ninth Circuits can hardly be denied. The Fourth Circuit held below

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[3] As Petitioner argues in his Petition at 14-16, the *Pireno* test, announced in the context of the McCarran-Ferguson Act's limited antitrust exemption, is an inappropriate vehicle for deciding cases arising under the primary purpose of the statute.

that the *Pireno* test applies to cases arising under the primary state regulatory purpose provisions of the McCarran-Ferguson Act and that state statutes regulating insurance insolvencies do not regulate the business of insurance upon application of the *Pireno* test. The Third Circuit reached exactly the opposite result, concluding that state statutes regulating insurance insolvencies do regulate the business of insurance upon application of the same *Pireno* test. The Ninth Circuit has reached yet a third result, concluding that the *Pireno* test does not apply, but that state statutes regulating insurance insolvencies do regulate the business of insurance upon application of the test announced in *Securities and Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453 (1969). *See Idaho ex rel. Soward v. Internal Revenue Service*, No. 87-4057. Moreover, the Second and Tenth Circuits have reached results inconsistent and diametrically opposed to the decision below.

CONCLUSION

The fact that the various circuits have employed different analyses has significant ramifications far beyond the confines of the instant litigation. The recent decisions of the Southern District of New York and the Tenth Circuit, particularly the latter court's reliance on the Third Circuit analysis, further underscore the need for prompt resolution of the important

questions at bar. For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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